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SUBJECT: CANADIAN COURT INTERVENES OVER TAMIL RELEASE

1. (SBU) Summary: A Federal Court decision has underscored the federal government's responsibility to exercise due diligence in determining the admissibility of individuals to Canada on security grounds, overturning an Immigration and Refugee Board (IRB) order to release a Tamil male whom the government had alleged was a suspected terrorist. The individual is one of 76 asylum seekers who arrived off the coast of British Columbia in October 2009 (reftel). The case is the first to clarify the limited scope of the IRB's authority to release an individual over the objections of the federal government whenever the government has a "reasonable suspicion" that the individual is inadmissible on grounds of security or violation of human or international rights, or when a federal probe into their admissibility remains ongoing. The Federal Court's ruling is a major victory for the government in its anti-terrorism efforts, to which Canadian courts have not always been sympathetic. End summary.

TAMILS: ASYLUM SEEKERS OR TERRORISTS?

2. (U) On February 2, the Federal Court of Canada overturned a release order by the IRB for one of 76 Tamils who arrived in October 2009 off the coast of British Columbia. On October 17, 2009, Canadian authorities had intercepted the freighter Ocean Lady off the coast of British Columbia. The vessel contained 76 Tamil males allegedly fleeing the conflict in Sri Lanka; all made refugee claims upon arrival. Authorities detained the men pending an investigation to verify their identities and their admissibility to Canada under the Immigration and Refugee Protection Act (IRPA). Reports alleged that the migrants had possible links to human smuggling or to the Liberation Tigers of Tamil Eelam (LTTE), which Canada has designated as a terrorist organization. Authorities detained the men subject to regular detention reviews.

IRB SATISFIED, BUT FEDERAL GOVERNMENT NOT

3. (U) The IRB had ordered the release of all 76 of the migrants, including at least one individual (whose identity is banned from publication) whom the federal government suspected as a member of the LTTE. Authorities have already released 48, but the federal government contested the release of others, pending the outcome of an ongoing investigation into their admissibility to Canada. In December 2009, the government applied to the Federal Court to overturn the IRB order. The Court heard the appeal in Vancouver on January 7 and rendered its judgment on February 2 in Ottawa. The individual (and the other 27) remain in custody.

4. (U) In support of its release order, the IRB had reported that it had found the respondent "credible" and the government's expert

witness (Dr. Gunaratna) "not credible" because of his links to the government of Sri Lanka. The IRB accepted that the Ocean Lady "possibly" was an LTEE-controlled ship, that "perhaps ... several" LTEE members were on board, and that Canadian authorities had found traces of explosives on the vessel. However, it asserted that "at this point" there was "nothing whatsoever" to tie the respondent to past or present membership in the LTEE. It further questioned the necessity and quality of the federal government's continued probe into the respondent's admissibility, judging that the probe was "no more than a fishing expedition" that was likely to turn up "nothing further of value." It concluded that while "a suspicion" remained that the respondent was inadmissible on security grounds, this was only "a mere possibility," and the suspicion was "no longer reasonable." In ordering the individual's release, it asserted that "detention is to be seen as a last resort" and that people in Canada are not detained on such mere possibilities."

¶5. (U) In response, the federal government contended that the IRB had erred in law by failing to recognize limitations under sec.58(1)(c) of IRPA requiring the IRB to defer to the government's assessment of the evidence and the need for further investigation when the government had "reasonable suspicion" of inadmissibility on security grounds.

PRIORITY OF PROTECTING CANADIANS AND BORDERS

¶6. (U) The Federal Court unequivocally upheld the government's argument and confirmed that the IRB's decision had "effectively usurped" the government's role in investigating national security threats. It judged that the IRB was "misconstruing the scope of its authority" under sec.58(1)(c) of the IRPA and rebuked the IRB for its "rather simplistic" view of the complexity of the investigation into the migrants' backgrounds, adding that "it was wrong" of the IRB to decide for itself whether the government had done enough to verify the individual's status. While it acknowledged that "the importance of not unduly detaining such persons cannot be forgotten," it underscored that "'the protection of Canadians and Canada's pressing interest in securing its borders are also worthy considerations" and that the government was entitled to a "reasonable time" to complete its investigation. The full text of the Court's decision is available at <http://decisions.fct-cf.gc.ca/en/2010/2010fc112/2010fc112.html>

¶7. (U) The Court gave the IRB until February 9 to submit additional written arguments and the federal government until February 16 to respond to them before the Court's ruling becomes final. An IRB spokesperson said the Board is "studying the decision with interest."

¶8. (SBU) Comment: The Federal Court's ruling is a major victory for the government in its anti-terrorism efforts, to which Canadian courts have not always been sympathetic. The legal battles in this case are probably not over yet, however.
JACOBSON